Pe Hong Yong v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 45–37 OF 2006
ABANG ISKANDAR JC
6 JUNE 2008

Criminal Law — Dangerous Drugs Act (Malaysia) — ss 12(2), 39A(2) — Possession of dangerous drugs — 27g of heroin and monoacetylmorphine mixture – Appropriate sentence — Whether deterrent sentence called for

Criminal Procedure — Sentence — Imprisonment — Whether adverse effects of long imprisonment term lessened by reasonable rehabilitative framework in prison

Criminal Procedure — Sentence — Possession of drugs — 27g of heroin and monoacetylmorphine mixture — Assessment of sentence — Whether deterrent sentence called for

Criminal Procedure — Sentencing — Mitigating factors — Guilty plea — Whether automatically warranted a discount in sentence — Whether plea of mixing with bad company qualified guilty plea

The accused was caught carrying a sling bag containing 27g of dangerous drugs. He was 24 years old at the material time and had no criminal antecedents. He pleaded guilty to an alternative charge of drug possession and was convicted thereon. Apart from his plea of guilt, counsel submitted several other factors in mitigation and urged the court to impose a light sentence. The deputy public prosecutor however pressed for a deterrent sentence arguing that: (i) a deterrent sentence would deter the accused and other would-be offenders from committing a similar offence; (ii) the drug menace posed an ever present threat to society.

Held, sentencing the accused to 12 years' imprisonment and 10 strokes of the rotan:

(1) Counsel in mitigation pleaded that the accused had been influenced by his wayward friends into committing the offence. This plea did not

qualify the plea of guilty by the accused. The plea did not impact on the essential ingredient of the offence of possession for which the appellant was charged in the alternative. The plea had been raised by the counsel more for evoking the sympathy of the court towards the accused, than as a serious challenge to the prosecution's case (see para 8).

(2) The mere fact that an accused person has pleaded guilty does not ipso facto oust the jurisdiction of the court to impose the maximum sentence. In appropriate cases the court may refuse to grant any discount in favour of the accused person who has pleaded guilty. In the present case, the accused deserved a certain discount in terms of the imprisonment term that should be imposed on him. However, that he would be given at least 10 strokes of the rotan was a given fact (see paras 18–19).

(3) The High Court would give due consideration in favour of the accused for having pleaded guilty. That he had no previous conviction also worked in his favour. The fact that he had supported his mother should be viewed as a plus for him. The appellant had brought the misery upon himself. The accused had formal education up to Form Five and as such he was not an illiterate. He was a young man who had a steady job as a shop assistant in one of his relatives' shop and was earning RM1,500 per month. The fact that the accused had only a small amount of money in his bank account did not conclusively mean that he was only a 'small player'. As regards the issue of a long term of imprisonment having an adverse influence on the accused, the prison system in Malaysia has in place a reasonable rehabilitative framework that provides inmates with life-skills training in preparation for release (see para 20).

(4) In the instant case, the public interest would be best served by imposing a deterrent sentence upon the accused. A deterrent sentence in this regard would be 12 years' imprisonment and 10 strokes' of the rotan, effective from the date of arrest (see para 26).

[Bahasa Malaysia summary

Tertuduh ditangkap membawa beg sandang yang mengandungi 27g dadah berbahaya. Dia berumur 24 tahun pada masa matan dan tiada rekod jenayah sebelum ini. Dia telah mengaku bersalah terhadap pertuduhan alternatif memiliki dadah dan telah disabitkan untuk itu. Selain daripada pengakuan bersalahnya, peguam telah mengemukakan beberapa faktor dalam mitigasi dan mendesak mahkamah untuk mengenakan hukuman ringan. Timbalan pendakwa raya bagaimanapun mendesak untuk hukuman pencegahan dengan berhujah bahawa: (i) hukuman pencegahan akan mencegah tertuduh dan mereka yang mungkin menjadi pesalah daripada melakukan kesalahan

A yang sama; (ii) ancaman dadah merupakan ancaman yang berpanjangan kepada masyarakat.

B **Diputuskan**, menjatuhkan hukuman 12 tahun penjara dan 10 kali sebatan rotan ke atas tertuduh:

(1) Peguam dalam mitigasi memplid bahawa tertuduh telah dipengaruhi oleh kawan-kawannya yang tidak terkawal untuk melakukan kesalahatn itu. Pli ini tidak membentuk pengakuan bersalah oleh tertuduh. Pli ini tidak memberi kesan kepada ramuan penting kesalahan milikan yang mana tertuduh telah dipertuduhkan secara alternatif. Pli ini telah ditimbulkan oleh peguam lebih untuk menimbulkan rasa simpati mahkamah terhadap tertuduh, daripada sebagai cabaran serius terhadap kes pihak pendakwaan (lihat perenggan 8).

(2) Dengan hanya fakta bahawa tertuduh telah mengaku bersalah tidak secara ipso facto menyingkirkan bidang kuasa mahkamah untuk mengenakan hukuman maksimum. Dalam kes-kes sesuai mahkamah boleh enggan memberikan pengurangan bagi pihak tertuduh yang telah mengaku bersalah. Dalam kes ini, tertuduh patut mendapat pengurangan tertentu dalam tempoh pemenjaraan yang patut dikenakan ke atasnya. Walau bagaimanapun, bahawa dia akan dikenakan sekurang-kurangnya 10 kali sebatan rotan merupakan fakta yang diberikan (lihat perenggan 18–19).

(3) Mahkamah Tinggi akan mempertimbangkan bagi pihak tertuduh yang memberikan pengakuan bersalah. Fakta bahawa dia tiada sabitan sebelum ini juga berpihak kepadanya. Fakta bahawa dia menyara ibunya patut diambil sebagai suatu yang positif untuknya. Perayu telah membawa masalah ke atas dirinya sendiri. Tertuduh mempunyai pengajian formal sehingga tingkatan lima dan oleh itu bukan seorang yang buta huruf. Dia seorang lelaki muda yang mempunyai pekerjaan tetap sebagai pembantu kedai di salah seorang daripada kedai saudaranya dan mendapat gaji RM1,500 sebulan. Fakta bahawa tertuduh mempunyai hanya sejumlah kecil wang dalam akaunnya tidak secara konklusifnya bermaksud bahawa dia hanya 'small player'. Berhubung isu tempoh penjara yang lama mempunyai kesan buruk ke atas tertuduh, sistem penjara di Malaysia mempunyai rangka kerja pemulihan yang munasabah yang memberikan banduan-banduan latihan kemahiran hidup dalam persediaan untuk pembebasan mereka (lihat perenggan 20).

(4) Dalam kes ini, kepentingan awam dapat dilaksanakan dengan baik dengan mengenakan hukuman pencegahan ke atas tertuduh. Hukuman

pencegahan di sini adalah selama 12 tahun penjara dan 10 kali sebatan rotan, berkuat kuasa dari tarikh tangkapan (lihat perenggan 26).]

Notes

For a case on ss 12(2) and 39A(2) of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 180.

For cases on mitigating factors, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4263–4267.

For cases on sentence for imprisonment, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3711–3721.

For cases on sentence for possession of drugs, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3919–3923.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534 (refd)
Christopher Khoo Ewe Cheng v PP [1998] 3 MLJ 881 (refd)
Heng Kim Khoon v PP [1972] 1 MLJ 30 (refd)
R v James Henry Sargeant (1974) 60 App R 74 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Mohd Radzi Abu Bakar v PP [2002] 3 MLJ 593 (refd)
PP v Gopalan [1985] 2 MLJ 230 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Maruthamuthu Sretharan [2007] 7 CLJ 368 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Safian Abdullah &Anor [1983] CLJ 804 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
Rex v Gronskowski [1946] 1 All ER 560 (refd)
Rex v Kenneth John Ball 35 Cr App R 164 (refd)
Tia Ah Leng v PP [2004] 4 MLJ 249 (refd)
Zaidon Shariff lwn PP [1996] 4 CLJ 441 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(2)

Shoba a/p Venu Gopal (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
RV Lingam (RV Lingam & Co) for the acussed.

Abang Iskandar JC:

INTRODUCTION

[1] On 9 April 2007, Pe Hong Yong had pleaded guilty to an alternative charge preferred against him by the public prosecutor. The alternative charge, as it appeared in its original language, reads as follows:

PERTUDUHAN PILIHAN

Kamu dituduh atas kehendak Pendakwa Raya dan Pertuduhan terhadap kamu ialah:

> Bahawa kamu pada 18hb Oktober 2005, jam lebih kurang 5.30 petang, di hadapan lif Tingkat 15, Sunway Lagoon Resort Hotel, Persiaran Lagoon, Bandar Sunway, di dalam daerah Petaling, di dalam Negeri Selangor Darul Ehsan, tanpa kebenaran yang sah telah ada dalam milikan kamu dadah berbahaya seberat 27gram (19.2 gram Heroin dan 7.8 gram Monoacetylmorphines), dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

[2] Simply put, it was a charge for possession of dangerous drugs without lawful excuse.

[3] The principal charge has been one under s 39B of the same Act, which provides for the mandatory death penalty upon conviction.

THE FACTS

[4] The facts as they were presented by the learned deputy public prosecutor ('the DPP') proved to be simple and straightforward. The police had arrested two Chinese males inside the lift on the 15th floor of the Sunway Lagoon Resort after a brief scuffle. They were taken out of the lift and a body search was conducted on them in front of the said lift. Nothing incriminating was found on the person of one of them. However, from inside a brown sling bag on the shoulder of the accused person the police had found substances suspected to be dangerous drugs. The accused person was arrested and upon due examination of the suspected substances by the government chemist, it was confirmed to contain the impugned drugs, namely heroin and monoacetylmorphines, totaling 27g in all. Hence the legal predicament in which the accused has found himself now.

[5] The DPP also presented to this court the various exhibits, including the impugned drugs that were concerned in the commission of the offence of illegal possession.

THE CONVICTION

[6] I was satisfied with the plea of guilty to the alternative charge which was read and explained to the accused in the Mandarin language. He also told this court that he had understood the consequences of his plea of guilty. He also admitted to the facts as presented by the DPP as correct. He had no quarrel

whatsoever with the exhibits as tendered by the DPP. Based on the above string of affirmation coming from the accused person, I had convicted him on his own unqualified plea and having considered the plea in mitigation by learned counsel and submissions by the DPP for appropriate sentence to be meted out on the offender, I had proceeded to sentence this offender to 12 years imprisonment and that he be given 10 lashes of the rattan. I had ordered too that the sentence of imprisonment to be effective from the date of his arrest.

THE APPEAL

[7] The offender had since then filed in his notice of appeal alluding to the fact that he was dissatisfied with the sentence which I had imposed on him.

THE GROUNDS FOR THIS COURT'S SENTENCE

[8] Before I proceed with my grounds for the sentence that I had deemed fit to mete out on this appellant, I would like to say a few words on one aspect of the plea in mitigation as forwarded by learned counsel ('counsel') for the appellant before me. It has been this, that is, that the appellant had been influenced by his wayward friends into committing this offence. The issue here is whether this would have the effect of qualifying the plea of guilty of the appellant. To my mind the answer is in the negative, for the simple reason that this did not impact on the essential ingredient of the offence of possession under which the appellant was charged in the alternative. The observation made by Hashim Yeop A Sani J (as he then was) in the case of *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, is relevant in this situation and I quote His Lordship, at p 257 thus:

> The only point raised by Mr Paramjit Singh worth considering is whether the Special President should have rejected the plea of guilty because the accused stated 'that he would be assaulted 'if he did not sell the drugs. *Heng Kim Khoon v Public Prosecutor* [1972] 1 MLJ 30. was cited as an example, where the judge in exercising his revisionary powers ordered a retrial because the accused had pleaded guilty under an erroneous view of the law. But it should be noted that that case and the other English cases cited therein concerned a plea in mitigation which affected an essential ingredient of the offence and that the explanation of the accused discloses no offence in law. That is not the case here. …'.

As such, likewise, based on the same reasoning, I had maintained my stand to accept his plea as being not qualified in any sense. To my mind, this matter had been raised by counsel for the appellant more for the purpose of evoking the sympathy of this court for the appellant than it had been meant as a serious challenge to the prosecution's case.

[9] The law on sentencing is rather clear and settled. It is basically a matter of the court's discretion. Short of the law which imposes a duty on the convicting court to mete out a mandatory sentence of a particular nature, generally the court has a wide discretion to impose a sentence from the minimum to the maximum as allowed by law and according to law. Having said that, a sentencing exercise is by no means an easy and mundane task. Neither is it a routine chore. Like any exercise of discretion, it has to be exercised judiciously, and not capriciously. Alluding to this fact, Wan Yahya J (as he then was) found it necessary to acknowledge it in his usual candid way in the case of *Public Prosecutor v Safian Abdullah &Anor* [1983] CLJ 804, wherein the learned judge opined, and I quote:

> … Sentencing offenders is indeed a complex discerning process, which depends not on the use of a common mathematical yardstick but on various considerations of facts and circumstances relating to the offence, the offender and public interest.

[10] I have also found the judgment of Hashim Yeop A Sani J (as he then was) in *Loo Choon Fatt* to be highly instructive when His Lordship said at p 257, as follows:

> In respect of sentencing there can only be guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.

[11] It has been said that criminal law is publicly enforced, and the author of those words was none other than Justice Hilbery J in the celebrated case of *Rex v Kenneth John Ball* 35 Cr App R 164. The purposes are two-fold. One is to serve as a punishment against the offender and the other being preventive in its objective, to be a deterrence to others who may be inclined to behave in the same or in a similar criminal way. While the interests of the individual offender have to be given their due considerations that they deserve, it has been made clear time and time again that the first and foremost consideration must be the public interest. It was said by Lord Goddard LCJ in *Rex v Gronskowski* [1946] 1 All ER 560 at p 561, thus:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

Indeed, His Lordship Hashim Yeop A Sani in *Loo Choon Fatt*'s case had observed that a convicted person will normally bring up problems of family hardships and other usual problems of living and that a further tough order which could be imposed by the court would add on to that burden. But His

Lordship proceeded on to remind the courts not to be overly sympathetic in that situation. According to him, a balance needed to be struck between the interests of the accused and those of the public.

[12] As such, ultimately how the court will deal with the offender must be viewed from this perspective. The question the court has to ask itself therefore must necessarily be, 'How would the public interest be best served when deciding on the mode or kind of sentence with respect to the offender?' It therefore becomes imperative upon the court then to consider the various guiding principles such as whether the facts and circumstances in the case obtaining before should warrant a punitive or a reformative or rehabilitative approach.

[13] So, what did this appellant say in his mitigation through his learned counsel to merit the minimum sentence that he said he deserved? Apart from saying that he was influenced by his wayward friends into committing this offence, the followings are the gist of his plea in mitigation:

(a) that he had pleaded guilty and thus had saved court's time;

(b) that he had no previous conviction;

(c) that he had been supporting his mother;

(d) that he had repented and had promised not to commit the same offence in the future;

(e) that he was not a big player in the illegal drug activities as evidenced by the small amount of money (@RM54) in his bank account book, P10;

(f) that he had attained only up to form 5 level of education;

(g) that he was 24 years old when he committed this offence and that he was a bachelor at the material time; and,

(h) that an unduly long custodial sentence would have more adverse repercussions than there would be positive impact on the appellant in view of the overcrowded state of our prisons.

[14] With this as a backdrop to his mitigation and backed up with a few decided cases, the appellant's counsel urged this court to impose against the appellant, the most lenient sentence that the law allows for an offence with which the appellant had been charged with. If I had agreed with him, that sentence would be 5 years imprisonment and 10 lashes of the rattan. The cases cited by learned counsel are as per listed below:

(1) *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167;

A (2) *Christopher Khoo Ewe Cheng v Public Prosecutor* [1998] 3 MLJ 881;

(3) *Public Prosecutor v Maruthamuthu Sretharan* [2007] 7 CLJ 368;

(4) *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45;

B (5) *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74;

(6) *Zaidon Shariff v Public Prosecutor* [1996] 4 CLJ 441.

[15] The gist of his plea has been that by pleading guilty the accused must C be given a discount on his imprisonment term which this court was minded of imposing on him.

[16] On the other hand, the DPP had urged this court to impose a sentence that would have the effect of deterring both this appellant from D committing the same offence in the future as well as to be a warning to would-be offenders who may be entertaining a similar idea. The DPP had directed the attention of this court to the ever present menace the illegal drug activities and the threat it is posing to our society. In support of her submissions she had referred this court to these cases:

E

(1) *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256;

(2) *Public Prosecutor v Gopalan* [1985] 2 MLJ 230;

(3) *Tia Ah Leng v Public Prosecutor* [2004] 4 MLJ 249;

F

(4) *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534

(5) *Mohd Radzi Abu Bakar v Public Prosecutor* [2002] 3 MLJ 593.

G **[17]** I had had the occasion of perusing through the cases cited by both parties. The synthesis of those cases taken together would tell me that by pleading guilty an accused person is entitled to some kind of a discount in terms of his imprisonment term, in deserving cases depending on the facts and circumstances before the court. In other words, a certain credit is due to H an accused person who has the good sense to plead guilty. The oft-cited case of *Abdullah Ang v Public Prosecutor* has been resurrected in all criminal courts in our country many a times as an authority for the proposition that where an accused person has pleaded guilty, he would be entitled to a discount of up to one-third of the sentence which the court would have imposed on him I had he been found guilty after a full trial. Then, there is a Court of Appeal decision in the form of *Tia Ah Leng v Public Prosecutor* which said that offences against the Dangerous Drugs Act 1952, should not be given any reduction in terms of imprisonment just because the accused has pleaded guilty. The tough stand taken by the learned justices in that case must have

been greatly driven by their utter disgust at the huge amount of the drugs involved. In that case, the appellant had in his illegal possession 13kg of heroin.

[18] Yet again, there is another Court of Appeal decision in *Bachik bin Abdul Rahman v PP*, which I believe has put the issue in its proper perspective. In essence, the learned justices in that case, in a speech delivered by Augustine Paul JCA (as he then was) decided that while it is a generally acceptable practice that an accused person who has pleaded guilty be given a certain amount of reduction in terms of imprisonment that could be imposed on him, that does not mean that the court cannot impose on him the maximum sentence provided under the law, if, in the considered opinion of the court, the facts and circumstances obtaining before it do not warrant such an exercise of its discretion in favour of the accused person who has pleaded guilty (the other members of the panel being Tun Ahmad Fairuz Chief Justice and Datuk Richard Malanjum JCA (as they then were)). In other words, the mere fact that the accused person has pleaded guilty does not ipso facto oust the jurisdiction of the court to impose the maximum sentence, because in appropriate cases the court may refuse to grant any discount in favour of the accused person who has pleaded guilty. Indeed, in *Bachik*'s case the court had also refused, based on the facts obtaining before it, to grant any discount in terms of sentence, although the appellant had pleaded guilty.

[19] In the present scheme of things, I had agreed with learned counsel that the appellant in our case deserved a certain discount in terms of the imprisonment term that should be imposed on him. The only question that was left that needed an answer was what would be the duration of his incarceration in prison bearing in mind that he had pleaded guilty. The fact that he would be given at least ten strokes of the rattan is a given fact.

[20] In considering the appropriate sentence against this appellant, I had taken into account his plea in mitigation. Of course I had given due consideration in favour of the appellant by him having pleaded guilty. That he had no previous conviction also worked in his favour. The fact that he had supported his mother had been a noble act on his part and should be viewed as a plus for him. Apart from those factors, I did not find much merit in the other matters raised by his counsel which could possibly help further his cause before me. I find that this appellant had brought this misery upon himself. I noted that he had formal education up to form five and as such he was not by any measure an illiterate. He was a young man who had a steady job as a shop assistant in one of his relatives' shop and was earning RM1,500 per month. He must be a young man in a hurry to be dabbling in drugs. The fact that he had only a small amount of money in his bank account does not conclusively mean that he was only a 'small player' [to use counsel's own

words]. As regards the issue of a longish imprisonment term in jail would have a more adverse influence on the appellant, I believe that the prison system in our country has put in place a reasonable rehabilitative framework within its gates by providing inmates training in skills in order to prepare them to take on a more meaningful life once they are released after serving their time.

[21] On the other hand, public interest demands that law and order must be maintained at all times. A sentence that is too lenient may well have the effect of sending a message to the public that it is worth committing an offence because if caught the court will only visit upon the offender a sentence that will be negligible! In the case of *R v James Henry Sargeant* Lawton LJ had the occasion to say these words, which I wish to quote:

> The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

[22] Juxtaposing the plea in mitigation of this appellant with the public interest considerations as forwarded by the DPP, and the fact that amount involved was 27g of heroin and monoacetylmorphines, I was inclined to impose on this appellant a sentence that would have a deterrent effect. I would still give him the requisite discount in terms of his imprisonment sentence based on his plea in mitigation but I would not accede to the urgings of learned counsel for me to impose the minimum imprisonment sentence on his client.

[23] In the context of the Dangerous Drugs Act 1952 the offence with which this appellant had been charged is the second most serious in terms of the severity of the punishment provided only because the first place is occupied by the mandatory death penalty under s 39B(2).

[24] If I were to quote Hashim Yeop A Sani J (as His Lordship then was) in *Loo Choon Fatt*'s case for one last time, it must be this one:

> In my view, the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute …

[25] The learned justices in *Tia Ah Leng*'s case had also echoed that same sentiment and had held that the courts should also help to curb these [drug] activities by imposing stringent punishments provided by the law. Those words still rang quite clearly in my ears and I would be less than honest by pretending to be deaf and not heed them.

[26] Based on the above, I was of the considered view that the public interest would be best served by imposing against this appellant a deterrent sentence and on that note I had thus sentenced this appellant to 12 years imprisonment and that he be given 10 strokes of the rattan. I also ordered that sentence of imprisonment be effective from the date of his arrest.

Accused sentenced to 12 years' imprisonment and 10 strokes of rotan.

Reported by Andrew Christopher Simon